Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978

No. 78-134

JAMES F. SEXTON,
Petitioner,

vs.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Claims

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Supreme Court of the United States

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No. .....

JAMES F. SEXTON,
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vs.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Claims

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Claims, entered in this proceeding on April 27, 1978.

OPINIONS BELOW

The opinion of the Court of Claims is contained in its February 9, 1978, Order, is unreported and appears at page A1 of the Appendix. The order denying petition for rehearing also appears in the Appendix at page A3.

JURISDICTION

The judgment of the United States Court of Claims was entered on February 9, 1978. A timely petition for rehearing was denied on April 27, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1255(1).

QUESTIONS PRESENTED

1. Whether a litigant can be denied, contrary to the provisions of the Fifth Amendment, the Administrative Procedures and Veterans Preference Acts, an equal protection and due process of law in the Court of Claims through application of the doctrine of res judicata where the Court of Claims is in conflict with its own prior decisions both as to the doctrine of res judicata and the standard of review in an employee discharge case, thus denying petitioner all administrative and judicial review on the merits as to the evidential content of forty-six (46) documents altered or removed from an administrative record filed in the sister court.

2. Whether petitioner has been denied administrative or judicial due process of law, contrary to the provisions of the Fifth Amendment, the Administrative Procedures and Veterans Preference Acts, as the result of the alteration and removal of documents in and from an administrative record used by an administrative agency to obtain a prior judgment, where the allegations of fraud, mistake, bad faith, and denial of administrative remedy, bring the evidential content of forty-six (46) documents into issue on the merits in a subsequent proceeding, particularly where the missing documents contain evidence of an infringement of the employee's First Amendment rights.

CONSTITUTION AND STATUTES INVOLVED

The Constitutional provision involved is the Fifth Amendment. The statutes involved are Title 5, Sections 7511, 7512, 7701, and Title 5, Section 706, of the United States Code. The Constitutional provision and statutes are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner had been an IRS agent for twelve years, from 1954 to 1966, and has a veteran's preference. His separation from the government service resulted from his refusal to accept a punitive transfer motivated by retaliation against him for exercise of his First Amendment rights. On September 16, 1970, petitioner filed a mandamus action in the District Court at Cleveland, Ohio. He filed a protective damage suit on August 18, 1972, in the United States Court of Claims. The latter court placed this action in suspense status pending outcome of the District Court proceedings. On July 3, 1974, the District Court granted the government's motion for summary judgment and dismissed the action. In doing so, the District Court ignored the existence of forty-six (46) documents that had been altered or removed from the administrative record filed by the government. This was done on the ground that petitioner was not entitled to an evidential review either as to the contents of the administrative record or of the documents that had been removed, with the result that the District Court denied petitioner any hearing on the merits as to the contents of the missing documents. On appeal, the Sixth Circuit affirmed, *Sexton v. Kennedy*, 523 F.2d 1311 (1975), holding that petitioner was precluded

any evidential review as to the agency action. This Court denied certiorari, *Sexton v. Simon*, 425 U.S. 973 (1976), though in its memorandum opposing the petition for certiorari, the Solicitor General conceded that there was judicial conflict between circuits. Petition for rehearing was denied, 429 U.S. 873 (1976).

To bring the missing documents before the Court of Claims, petitioner filed a motion for leave to amend his petition by adding two counts and further he opposed by affidavit the respondent's motion for summary judgment. The pertinent allegations of the amended petition stated that on September 25, 1972, a certified copy of an administrative record had been filed in the United States District Court for the Northern District of Ohio, Eastern Division, bearing a certificate over the signature of James C. Spry, Executive Assistant to the Commissioners, United States Civil Service Commission, that it constituted the entire file of the Civil Service Commission relating to the case. Petitioner alleged that this was a false certificate, and then alternatively he alleged fraud, mistake, or bad faith, specifically the removal or alteration of relevant, important and material documents from an official government file and causing the use of that file by an administrative agency and in a court of law. The elements of malice, intent, knowledge and/or other condition of mind to petitioner's detriment were alleged. In addition to the issue of fraud, mistake, or bad faith, there also is present in the case the denial of any and all administrative remedy respecting the documents as the result of letters sent by petitioner on April 16, 1977, May 14, 1977, and June 30, 1977, to the Civil Service Commission asking reopening of the case and administrative review of the altered or missing documents, a remedy which the Civil Service Commission denied, thus precluding petitioner any and all administrative review as to the merits and contents of the altered and missing documents.

Petitioner on August 19, 1977, by letter to the Court of Claims asked that Court to remove the case from suspense. Respondent on September 29, 1977, filed its motion for summary judgment. Petitioner on November 30, 1977, filed his motion for leave to amend his complaint and his opposition to respondent's motion for summary judgment. Petitioner incorporated the altered and missing documents by affidavit into the proceedings. The existence of these documents, and that they have been altered or removed, has never been disputed by counter affidavit, or by any other sworn document. Petitioner further incorporated into the case his letters to the Civil Service Commission asking that the case be reopened and that the documents removed or altered be reviewed by the Civil Service Commission on the merits as to the contents of the altered and missing documents. This remedy was denied by the Commission.

In that status, on February 9, 1978, the Court of Claims sustained respondent's motion for summary judgment and denied petitioner's motion for leave to amend his petition. In so doing, the Court of Claims recognized that forty-six (46) documents had been altered or removed (Appendix, p. A2). Petitioner's contentions had been and are that all forty-six (46) of the documents were important. The Court of Claims further on April 27, 1978, denied petitioner's motion for rehearing (Appendix, p. A3). The result is that petitioner has been denied any merit review and determination by the Civil Service Commission respecting the evidential content of the forty-six (46) documents as respects the administrative record. Petitioner also has been denied any and all judicial review respecting these documents.

REASONS FOR GRANTING THE WRIT

I. To Apply Res Judicata in This Case Denies Petitioner All Administrative or Judicial Hearing on the Merits As to the Contents of Forty-Six (46) Documents Altered or Removed From an Administrative Record Filed in a Sister Court. This Is a Complete Denial of Due Process As to the Altered and Missing Documents. The Order of the Court of Claims Is in Conflict With Its Own Prior Decisions Which Require a Merit Determination As to the Evidential Content of the Forty-Six (46) Documents Before Res Judicata Can Apply. Its Decision Makes Even More Apparent a Prior Conflict Between Circuits As to Evidential Review in an Employee Discharge Case.

The difficulties in this case have been created because of the differing standards of review applied in employee discharge cases. The Sixth and Seventh Circuits limit the scope of review to whether the action has been arbitrary or capricious and whether applicable procedures have been followed. These Circuits deny the right to evidential review. See *Baum v. Zuckert,* 342 F.2d 145 (6th Cir., 1965); *Sexton v. Kennedy,* 523 F.2d 1311 (6th Cir., 1975); *Brown v. Zuckert,* 349 F.2d 461 (7th Cir., 1965); *Pauley v. United States,* 419 F.2d 1061 (7th Cir., 1969). On the other hand, the District of Columbia, Third and Fourth Circuits follow the "substantial evidence" rule as well as to review the procedures followed and whether the action taken was arbitrary or capricious. See *Charlton v. United States,* 412 F.2d 390 (3rd Cir., 1969); *McCourt v. Hampton,* 514 F.2d 1365 (4th Cir., 1975); and *Pelicone*

v. Hodges, 320 F.2d 754 (D. C. Cir., 1963). In *Sexton v. Simon,*[1] U. S. Supreme Court Case No. 75-1219, the Solicitor General, on pages 5 and 6 of his memorandum in opposition to the petition for certiorari, admitted conflict between *Charlton v. United States, supra,* and *Pauley v. United States, supra,* and further on page 6 of his memorandum admitted that the Sixth Circuit in *Sexton v. Kennedy, supra,* "followed *Pauley* in refusing to review the substantiality of the evidence." This concession basically is an admission by the Solicitor General that petitioner was precluded any judicial review as to the merits and evidential content of the altered and missing documents.

When petitioner moved into the Court of Claims, the respondent contended that Court's res judicata decision in *Edgar v. United States,* 145 Ct. Cl. 9 (1959) was applicable. Petitioner did not agree on the basis of Court of Claims' decisions in *O'Brien v. United States,* 148 Ct. Cl. 1 (1960) and *State of Oklahoma v. United States,* 146 Ct. Cl. 185 (1959). Those decisions held that res judicata does not apply to a case where "the merits of the controversy were never reached * * *". *O'Brien v. United States, supra,* at page 3. *State of Oklahoma v. United States, supra,* at pages 193 and 194, represents a similar holding, with the result that the Court of Claims in its February 9, 1978, Order does not follow its own prior decisions. At the same time, the Court of Claims in its Order recognized a difference in standard of review between the Sixth Circuit and the Court of Claims, citing *Baum v. Zuckert, supra,* and *Roskos v. United States,* 213 Ct. Cl. 34, 549 F.2d 1386 (1977). Suffice it to say that the standard of review in an employee discharge has created a legal maze between the various circuits and

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1. *Sexton v. Kennedy, supra,* and *Sexton v. Simon, supra,* are the same case, the latter resulting from name change on certiorari.

the conflict now extends into the Court of Claims. This conflict both as to standard of review and res judicata should be resolved by this Supreme Court.

II. The Court of Claims Is in Conflict With the Third Circuit in Denying Petitioner Any and All Merit Determination Respecting the Evidential Content of Forty-Six (46) Documents That Had Been Altered or Removed in the Proceedings Before the Civil Service Commission. In So Doing, the Court of Claims Has Denied Petitioner All Administrative and Judicial Remedy Respecting the Missing and Altered Documents.

The discharge of a veteran's preference eligible is governed by Title 5, Sections 706, 7511, 7512 and 7701. The Fifth Amendment to the United States Constitution governs the due process application of the procedures which these statutes define.

The Court of Claims in its February 9, 1978, Order recognizes that its scope of review is broader than that of the District Court. *Baum v. Zuckert, supra,* and *Roskos v. United States, supra.* In this regard, respecting the missing documents, see also as to de novo evidence, *Brown v. United States,* 396 F.2d 989 (Ct. Cl., 1968), making possible in the Court of Claims an evidential review as to the merits of the contents of the missing and altered documents. In this background, the decision of the Court of Claims in the instant case is in conflict with the decision in *Higgins v. Kelley,* 574 F.2d 789 (3rd Cir., 1978), which holds that an incomplete record is insufficient for purposes of any judicial or administrative review, so that res judicata simply does not apply.

In *Higgins v. Kelley, supra,* at page 792, the Third Circuit states:

> "* * * The applicability of *Twiggs* to the instant case lies in * * * our recognition of the importance of a complete record as a basis for district court review. Absent a complete record, the reviewing court is incapable of complying with the procedural requirements statutorily mandated by the Administrative Procedure Act. 5 U.S.C. Sec. 706 (2) (D) (1970)."

Again, at page 793, the Third Circuit states:

> "We conclude that information to which the defendant is entitled for the preparation of a proper defense was wrongfully excluded at the administrative level. Therefore, the record was incomplete when it came up for review in the district court. In view of our holding in *Twiggs v. United States Small Business Administration,* supra, * * * district court review of an incomplete record does not satisfy the procedural requirements of the Administrative Procedure Act, 5 U.S.C. Sec. 706 (2) (D) * * *".

In basic substance, in the instant case, until such time as the contents of the removed and altered documents are reviewed and considered in conjunction with the administrative record, this petitioner has not had his day in court. Until these documents are considered either by the Civil Service Commission or by the Court of Claims, this petitioner has been denied the due process which both the Fifth Amendment and federal statutes define to be the law.

Another reason that the instant case is in conflict with *Higgins v. Kelley, supra,* lies in the petitioner asking for a reopening of his case by the Civil Service Commission to consider the altered and missing documents. The criteria for reopening were present in the instant case, which

is the holding in *Higgins v. Kelley, supra.* In fact, in a visit to the offices of the Civil Service Commission, petitioner became aware of letters dated March 8, 1971, from the Civil Service Commission to L. Patrick Gray III, Assistant Attorney General, and from L. Patrick Gray III dated March 19, 1971, to the United States Attorney in Cleveland, Ohio.

The substance of this correspondence was to the effect that petitioner could not bring these documents to the attention of the District Court in Cleveland, Ohio, without first bringing them to the attention of the Civil Service Commission. Only after this was done could petitioner be considered to have exhausted his administrative remedy respecting the altered and missing documents. The result is that petitioner by his letters of April 16, 1977, May 14, 1977, and June 30, 1977, did exactly what the respondent in its own correspondence stated had to be done. At this point the Court of Claims had before it an issue that was not and could not have been decided by the District Court, with the result that the res judicata doctrine clearly does not apply, thus placing the Court of Claims in clear and open conflict with the Third Circuit's decision in *Higgins v. Kelley, supra,* on the specific ground of administrative remedy. Petitioner is entitled to an administrative review of these documents. That is the holding in the *Higgins* case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the Court of Claims.

Respectfully submitted,

JAMES F. SEXTON
Counsel for Petitioner

APPENDIX

ORDER AND OPINION OF THE UNITED STATES COURT OF CLAIMS

(Filed February 9, 1978)

No. 321-72

IN THE UNITED STATES COURT OF CLAIMS

JAMES F. SEXTON,

v.

THE UNITED STATES.

Wrongful discharge; res judicata

James F. Sexton, Pro se.

Alan L. Feber, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant.

Before DAVIS, *Judge,* Presiding, NICHOLS and KASHIWA, *Judges.*

ORDER

This wrongful discharge suit is before the court on defendant's motion for summary judgment and plaintiff's opposition thereto and plaintiff's motion for leave to amend his petition and defendant's opposition thereto. After careful consideration of the briefs, we grant defendant's motion for summary judgment and deny plaintiff's motion for leave to amend his petition.

The facts of this case are set forth in detail in *Sexton v. Kennedy,* 523 F. 2d 1311 (6th Cir. 1975), and need no further elaboration here. Plaintiff originally brought this suit in the federal district court for the Northern District of Ohio. He subsequently filed a protective suit in the Court of Claims but proceedings here were suspended pending the outcome of the federal district court action. The federal district court suit was concluded when the court granted defendant's motion for summary judgment. *Sexton v. Kennedy,* No. C70-883 (July 3, 1974). Plaintiff appealed that decision to the Sixth Circuit Court on the same grounds that he is urging here (i.e., that the administrative record before the district court was incomplete for 46 documents were missing—two of which plaintiff contends are highly relevant). The Sixth Circuit, after reviewing the record and the documents, affirmed the district court. *Sexton v. Kennedy, supra.* Plaintiff sought Supreme Court review of the Sixth Circuit's decision, but certiorari was denied, 425 U. S. 973 (1976).

Defendant's motion for summary judgment contends that under the doctrine of *res judicata* the federal district court decision bars further consideration of plaintiff's suit in this court. Plaintiff does not agree. We hold that plaintiff's suit is barred by the doctrine of *res judicata.* Even if there should be a difference in the standard of review followed by this court and the Sixth Circuit Court of Appeals, *see Baum v. Zuckert,* 342 F. 2d 145 (6th Cir. 1965), *Roskos v. United States,* 213 Ct. Cl. 34, 549 F. 2d 1386 (1977), this does not affect the doctrine of *res judicata.* Plaintiff chose the forum in which to bring his case and his claim and was given consideration plus full judicial review. He cannot now move to another forum, this court, and relitigate his claim simply because

he feels this court may be more sympathetic because it has adopted a different standard of review than the forum in which the first proceeding occurred. Therefore,

IT IS ORDERED that defendant's motion for summary judgment be and hereby is granted. Further, it is ordered that plaintiff's motion for leave to amend his petition be denied and the petition be dismissed.

By the Court
/s/ OSCAR H. DAVIS
Judge, Presiding

ORDER OF THE UNITED STATES COURT OF CLAIMS DENYING MOTION FOR REHEARING

(Filed April 27, 1978)

No. 321-72

IN THE UNITED STATES COURT OF CLAIMS

JAMES F. SEXTON,

v.

THE UNITED STATES.

Before DAVIS, *Judge,* Presiding, NICHOLS and KASHIWA, *Judges.*

ORDER

This case comes before the court on plaintiff's suggestion and motion, filed March 27, 1978, for rehearing *en banc* pursuant to Rules 7(d) and 151(b) with reference to the order entered herein on February 9, 1978, dismissing

the petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the five active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

By the Court

/s/ OSCAR H. DAVIS
Judge, Presiding

UNITED STATES CONSTITUTION AND STATUTES

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. §706

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant ques-

tions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall eview the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

5 U.S.C. §7511

§7511. Definitions

For the purpose of this subchapter—

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia, but does not include an employee whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the Senate, except an employee whose appointment is made under section 3311 of title 39; and

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528.

5 U.S.C. §7512

§7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to—

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528.

5 U.S.C. §7701

§7701. Appeals of preference eligibles

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 530.